

DECISION



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THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

[Protest of IFB Provisions]

FILE: B-196843; B-196929 DATE: April 8, 1980

MATTER OF: A&P Surgical Co., Inc.

DL602099

DIGEST:

IFB provisions notifying bidders of possible waiver of Buy American Act preference are not inconsistent with total small business set-aside, since small business firms may, in some cases, offer products not totally manufactured with domestic material and labor without negating their status as small business concerns.

A&P Surgical Co., Inc. (A&P) protests invitations for bids (IFB) Nos. DLA120-80-B-0350 and DLA120-80-B-0471, issued by the Defense Logistics Agency (DLA), Defense Personnel Support Center, Philadelphia, Pennsylvania.

Both solicitations were issued as total small business set-asides for surgical scissors. The IFBs include two clauses entitled "Notice of Potential Foreign Source Competition." One clause advises bidders that a waiver of Buy American Act preference may be granted for certain unidentified foreign sources. The other clause states that a determination has been made by the Secretary of Defense that items produced or manufactured in the United Kingdom -- Great Britain and Northern Ireland will be evaluated without applying the import duties and price differentials usually applied under the Buy American Act.

A&P objects to these clauses. The protester contends that DLA should not consider bids involving foreign material or labor, since the procurement is set aside for small business firms. A&P asks that the clauses be deleted, maintaining that consideration of any bid "utilizing foreign material or labor in any part" would be inconsistent with the purpose of a total small business set-aside.

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To be eligible to participate in a procurement set-aside for small business, a bidder must be a small business concern under the criteria set forth in the regulations of the Small Business Administration (SBA). Ammark Corporation, B-192052, December 21, 1978, 78-2 CPD 428; Defense Acquisition Regulation (DAR) § 1-706.5(c) (DAC 76-19, July 27, 1979). In addition to meeting these criteria, a manufacturer or regular dealer submitting an offer in its own name must furnish end items manufactured or produced by small business concerns. DAR § 7-2003.2 (DAC 76-15, June 1, 1978).

A&P's position is that to be eligible for award in a small business set-aside a bidder must not only be a small business, but also furnish products manufactured or produced exclusively by domestic small business concerns. For this reason, A&P believes it is inconsistent to use the clauses relating to the Buy American Act in a procurement restricted to small business.

We have held an indication that a small business will furnish a foreign product should not be viewed as automatically negating its status as a small business concern. Ammark Corporation, supra. Rather, if a bidder indicates that foreign components will be used, contracting agencies should question whether the extent of foreign involvement would negate small business status and if appropriate refer the matter to the SBA for decision. Ammark Corporation, supra. In such cases a firm may qualify as a small business even though the item is not completely of domestic origin if the small business makes some significant contribution to the manufacture or production of the contract end item. See Matter of Size Appeal of Surgical Instrument Company of America, Small Business Size Appeals Board, No. 1245, March 15, 1979; American Amplifier and Television Corporation, 53 Comp. Gen. 463 (1974), 74-1 CPD 10.

The Buy American Act preference given to domestic end products is separate and distinct from the question of whether a particular firm is a small business. However, since it is possible that a small business could offer a product subject to the Buy American Act and remain eligible for award under the set-aside, the subject clauses which deal with the applicability of the Act were properly in the solicitation. Ammark Corporation, supra.

The protest is denied.

*Milton J. Fowler*

For The Comptroller General  
of the United States